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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, Superintendent,
Petitioner,
v.
KWAN FAI MAK,
Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Kwan Fai Mak, through counsel, moves pursuant to Supreme Court Rule 39 for leave to proceed in forma pauperis. The undersigned counsel were appointed by the United States Court of Appeals for the Ninth Circuit under the Criminal Justice Act. Mr. Mak was granted leave to proceed in forma pauperis by the United States District Court on November 9, 1933, and continued that status in the Court of Appeals.

DATED: January 27, 1993.

Respectfully submitted,

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JAMES BLODGETT, Superintendent, Petitioner, v. KWAN FAI MAK, Respondent.	AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
: ss.
County of King)

I, John B. Midgley, a member of the Bar of this Court, hereby certify that on the 27th day of January, 1993, I mailed, first class postage prepaid, one copy of Respondent's Brief In Opposition and one copy of Respondent's Motion To Proceed In Forma Pauperis, to Petitioner's Counsel of Record:

Kathleen D. Mix
Senior Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116.

I further certify that all parties required to be served have been served.

JOHN B. MIDGLEY, WSBA #6511
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SUBSCRIBED AND SWORN TO before me this 27th day of _____, 1993.

BEVERLY S. MILLER
STATE OF WASHINGTON
NOTARY --•-- PUBLIC
My Commission Expires 9-17-96

NOTARY PUBLIC in and for the State of Washington, residing at: _____.
My commission expires: _____

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JAMES BLODGETT, Superintendent,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Kwan Fai Mak respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals' opinion in this case. That opinion is reported at 970 F.2d 614 (9th Cir. 1992).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petitioner has not included the full text of the several provisions of the State of Washington's capital punishment statute that are important to an understanding of this case. The key provisions are Wash. Rev. Code. §§ 10.95.020 - 10.95.090, all of which are attached in the Appendix hereto at pp. A-1 to A-8.

STATEMENT OF THE CASE

The state has failed in its petition to acknowledge or

adequately discuss key factual matters. We state these here.[1]

1. Trials And Sentences Of Mr. Mak And His Co-Defendants

As the district court found regarding the three young men who were involved in the crimes in this case:

> Benjamin Ng was tried first and convicted on all counts. He had fired most of the fatal shots. At the penalty phase mitigating evidence was presented in his behalf. The jury did not agree unanimously that the state had proved beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. Accordingly, Benjamin Ng was sentenced to life in prison without possibility of parole.
>
> [Habeas petitioner Mr. Mak, respondent here] was twenty-two years old at the time of the crime. He had come to this country from Hong Kong at age fifteen, as an immigrant with his family. His trial, before a different jury, followed that of Benjamin Ng. Petitioner's trial also ended in a verdict of guilty on all counts. The prosecution argued, and petitioner denied, that he had planned the crime. In the penalty phase virtually no mitigating evidence was presented in his behalf. The jury found that there were not sufficient mitigating circumstances to warrant leniency. On October 1, 1983, petitioner was sentenced to death.
>
> Tony Ng was the last to be tried. He was captured in Calgary, Alberta, in October, 1984. Because Canada has no capital punishment, had the prosecutor sought the death penalty, Ng's attorneys and Canadian authorities could have resisted extradition. The prosecutor's decision not to seek he death penalty made possible Tony Ng's return to Seattle. He was convicted on thirteen counts of first degree robbery and one count of second degree assault, and was sentenced to seven consecutive life terms in prison.

Mak v. Blodgett, 754 F. Supp. 1490, 1491-1492 (W.D. Wash. 1991), aff'd, 970 F.2d 614 (1992).

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[1]/ The record is cited as follows: The federal district court Clerk's Record papers are cited as "CR" followed by the docket number. The federal district court Reporter's Transcript is cited as "TR" followed by the hearing date and page number. The state court record is consecutively paginated and filed with the federal courts in volumes. That record is cited by volume and then page number as in the following example: "11 REC 3943".

2. The Washington Capital Punishment Statute

Under the Washington capital punishment statute (all relevant sections attached in the Appendix), a separate penalty trial is convened if the defendant is convicted of aggravated first degree murder. At this penalty proceeding the jury must answer the following question:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

Wash. Rev. Code § 10.95.060(4). "In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously." Id. Unless the jury is unanimously convinced that the mitigating circumstances are not sufficient to merit leniency, the sentence is automatically required to be life without possibility of parole. Wash. Rev. Code § 10.95.080(2). Thus, there is no such thing as a "hung jury" on penalty.

Even if convicted of aggravated first degree murder at the guilt phase, a defendant enters the penalty trial with a presumption that he is entitled to leniency, that is a sentence of life without possibility of parole or release. Campbell v. Kincheloe, 829 F.2d 1453, 1466 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988); State v. Jeffries, 105 Wash.2d 398, 425, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). Generally speaking, subject to rebuttal evidence, only the defendant's criminal record and mitigating evidence may be introduced in the penalty phase. State v. Bartholomew, 101 Wash.2d 631, 683 P.2d 1079 (1984); Campbell, 829 F.2d at 1462.

3. The Record Regarding Relative Culpability.

The physical evidence showed that 26 of 32 shell casings found at the Wah Mee came from a Ruger .22 automatic pistol. 9 REC 3118-3120. The state has conceded that co-defendant Benjamin Ng, and not Mr. Mak, carried and fired this Ruger, and so therefore did most if not all of the shooting. State's brief on direct appeal, 26 REC 8991-8992; state's Brief in Court of Appeals at 53.

In addition, Mr. Mak testified that he went to the Wah Mee only to administer a beating at the behest of his tong leaders but he had no plan or knowledge that people would be killed. See 9 REC 3262-3306.[2] Mr. Mak was acquitted of the aggravating factor of having a scheme or plan which included murder(19 REC 6886), while co-defendant Benjamin Ng, identified by eyewitness Wai Chin as entering the club separately with the bag of ropes and ordering everyone to raise their hands (18 REC 6520-6523) was convicted by the jury in his trial of the aggravating factor of having planned or schemed the murders (18 REC 6573).

Mr. Mak's court appointed public defenders planned to present, and discussed in opening statement, evidence that Benjamin Ng was connected with one Hing Wong under circumstances showing that Wong wanted to control illegal gambling in Seattle's International District and that he and Ng, unbeknownst to Mr. Mak, may well have planned and set in motion the robbery and consequent killings at the Wah Mee in order to accomplish this. 6 REC 2254-2255. However, the trial court excluded the evidence

---

[2]/ The "tongs" involved are organizations that, among other things, conducted illegal gambling operations and provided protection for those operations. 9 REC 3225.

during the guilt phase. E.g., 8 REC 3767-3785. The trial court refused as well to allow any of this evidence to be presented as mitigating evidence at the penalty phase. 11 REC 4098-4100.[3]

4. Verdict And Penalty Phase

The jury found Mr. Mak guilty of aggravated first degree murder, finding two "aggravating circumstances", i.e. that the murders were committed to conceal the commission of a crime and in furtherance of a robbery. 19 REC 6886. However, as stated above, the jury rejected the charge that the murders were in furtherance of "a common scheme or plan" of Mr. Mak's (Id.), while the jury in the Ben Ng trial had found that the murders were pursuant to a "common scheme or plan" of Ng's. 18 REC 6573.

The penalty phase began about three hours after the aggravated murder verdict was taken. 11 REC 4114.[4] Defense counsel had failed to seek and therefore did not uncover and produce at the penalty phase available mitigating evidence from Mr. Mak's parents and other family members about Mr. Mak's relationships and positive attributes, and expert testimony about his personal and cultural background. Evidentiary hearing, TR 10/30/90 and exhibits admitted at that hearing. The district court found that this "substantial and important mitigating

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[3]/ Tony Ng, the third co-defendant who was tried long after the other two when he was returned from Canada, testified at his own trial. Among other things, he corroborated Mr. Mak's testimony that Mak planned to beat someone up at the Wah Mee in relation to the tong dispute and that murder was not discussed. See 7 Tony Ng REC 2178- 2212. The state's assertion that the Tony Ng testimony "firmly establishes that Mak planned the Wah Mee murders..." (Petition at 24, n. 14) is inaccurate.

[4]/ As the district court found, "the defense lawyers made an informal request, off the record for additional time to prepare for the penalty phase. [Citing CR 306] They failed to make or argue a motion, or do anything else on the record for that purpose." 754 F.Supp. at 1501.

evidence" was "readily available" at the time of trial. 754 F.Supp. at 1496. No family member testified, although many would have had they been asked to provide evidence of Mr. Mak's good qualities. Id. at 1496-1499. The district court also found that "it is clear that counsel failed to present the available mitigating evidence solely through oversight. There was no risk in presenting it. There was no decision on their part to leave it out." Id. at 1500.[5]

Without the "readily available" mitigating evidence regarding Mr. Mak's positive qualities and background, the prosecutor was able to argue in penalty phase summation:

> What separates Willie Mak from the others, is the same thing that distinguishes him from all other murderers, the premeditation of this crime, the intent to kill of this crime, the total absence of fundamental values. There's nothing here to lessen moral culpability.

11 REC 4170-4171 (emphasis added). No evidence to meet this claim was presented by the defense. See also 11 REC 4143-4144, 4166 (prosecutor arguing that Ng verdict and testimony about the vagaries of eyewitness identification -- the sum total of the defense evidence at the penalty phase -- hardly relate to mitigation for Mr. Mak).

The jury instructions given at Mr. Mak's penalty phase trial were different from those given at Benjamin Ng's penalty phase.

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[5]/ The state incorrectly claims that "counsel were aware of many of the items of information Mak has now assembled." Petition at 16. This assertion is without support in the record.

The state also incorrectly questions the district court's strongly supported finding that there was no risk to presenting the missing mitigation evidence. Petition at 7. The district court based the "no risk" finding on the undisputed testimony of both the two trial prosecutors and the two trial defense lawyers. (754 F.Supp. at 1500, quoting and citing testimony), and had before it cross-examination done by the state's lawyers for the evidentiary hearing below, which revealed nothing damaging.

The state successfully proposed a new instruction specifically for the Mak penalty phase that included the language "jurors have a duty to consult with one another and to deliberate with a view to reaching a unanimous verdict ..." (19 REC 6858-6859 (proposal); 19 REC 6881 (instruction given)), even though under Washington law only a death sentence requires a unanimous verdict and a nonunanimous verdict would result in a life sentence. Wash. Rev. Code §§ 10.95.060(4); 10.95.080.

REASONS WHY THE PETITION SHOULD BE DENIED

As is shown below, the Petition fails to accurately describe what the Court of Appeals did in the true context of this case. The actual narrow, factually grounded, per curiam opinion rendered by the Court of Appeals panel (which no active judge in the Circuit thought questionable enough to call for a vote on the question of rehearing en banc) refutes the state's claims about it.

The Court of Appeals granted habeas relief because the trial court prevented the defendant from presenting relevant mitigating evidence to the sentencing jury. The court also found that trial counsel failed to render effective assistance of counsel in the penalty phase of trial and that the trial judge's charge to the jury violated the Constitution, but did not determine whether these latter two claims independently required relief in light of its conclusion that the exclusion of mitigating evidence alone required relief.[6] The state makes no case for review in this

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[6]/ The state claims the Court of Appeals failed to identify the errors that led it to affirm the district court's grant of habeas relief as to sentence. Petition at 10, n. 4. However, the opinion itself makes clear that the Court of Appeals granted relief on the exclusion of evidence ground and also (continued...)

Court of what the Court of Appeals actually did.

I. THE COURT OF APPEALS DECISION REGARDING THE PROHIBITION ON DEFENSE PENALTY PHASE EVIDENCE WAS BASED ON TWO INDEPENDENT GROUNDS; THE PETITION DOES NOT EVEN MENTION ONE OF THE GROUNDS, AND ON THE OTHER THE COURT OF APPEALS MADE A ROUTINE APPLICATION OF SETTLED PRINCIPLES OF THIS COURT'S CAPITAL JURISPRUDENCE.

A. The State Fails To Challenge An Independent Ground For The Decision In The Court of Appeals.

The state fails to mention in the Petition the key point that the Court of Appeals' holding on the exclusion of mitigating evidence at the penalty phase was based on two grounds, each of which the court found "compelling." Mak, 970 F.2d at 624.

As the Court of Appeals recognized, a capital defendant has a constitutional right to present any evidence relating to either the circumstances of the offense or the characteristics of the defendant that might tend to support a sentence less than death, Skipper v. South Carolina, 476 U.S. 1 (1986), and as a close corollary, the Constitution also requires that a capital defendant be permitted to present evidence to rebut the prosecution's evidence and arguments, Skipper, 476 U.S. at 5 n.1 (opinion of the court), 476 U.S. at 9-11 (Powell, J. dissenting except on this point), both citing Gardner v. Florida, 430 U.S. 349 (1977).[7] The Court of Appeals ruled for Mr. Mak on both of these grounds. 970 F.2d at 622-624.

Taking first the second, "rebuttal", ground (ignored by the

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[6](...continued)
found, but did not attempt to judge prejudice from, serious constitutional problems in the other two area that the state itself complains about in the Petition.

[7]/ Thus, all nine Justices agreed in Skipper that the prosecution's argument at sentencing that Skipper would be violent in prison made his prison record and behavior relevant to sentence.

state), the Court of Appeals correctly recognized that the prosecution made the excluded evidence relevant by insisting that Mak was the only leader:

> Mak also argues that the actions of the prosecutor in painting Mak as the ringleader made the issue of Hing Wong's alleged participation in the massacre relevant, even if it would not otherwise have been. In closing argument, the prosecution said of Mak: "He made the plan and he went out and he carried out the plan, and the job of the defendant was the leader. His job was to oversee everything else that was done by this two crime partners. It was Willie Mak who was in charge. He was not the confused outsider that he would have you believe, but he was the leader of the crime, acting with the motive to commit robbery."
>
> These arguments not only made the issue of Mak's role in the offense relevant, Mak argues, but also gave Mak a due process right to an opportunity to rebut. In Skipper, the Court stated:
>
> > Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."
>
> 476 U.S. at 5 n. 1, 106 S.Ct. at 1671 n. 1 (quoting Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977)).
>
> Under either due process argument, Mak's position is compelling....

Mak, 970 F.2d at 623-624 (emphasis added). This wholly independent ground for the granting of habeas relief as to the penalty phase, unchallenged by the state in its Petition here, completely supports the judgment below.

B. The Court of Appeals Otherwise Applied Settled Precedent On The Exclusion Of Mitigating Evidence At The Penalty Phase.

The state does try to challenge here the other prong of the Court of Appeals' holding on the exclusion of defense evidence. However, the state's claims are unfounded and this holding presents neither any novel application of this Court's decisions

nor any other issue of importance.

The state premises its claims on incorrect statements about what the Court of Appeals did. As a telling example, the state claims that the Court of Appeals's "version of Mak's offer of proof, and the court's analysis of this claim, is derived exclusively from the dissenting opinion ...[in] the Washington Supreme Court." Petition at 18, n.9 (emphasis in original). Every word of this assertion is misleading. Most importantly, the Court of Appeals's analysis of this issue was explicitly based on this Court's opinions:

> Mak argues he had a constitutional right to present all relevant mitigating evidence related to his character or the circumstances of the offense at the sentencing phase of his trial. We agree. The Supreme Court held in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), that "the sentencer [may] not be precluded from considering, as a 'mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Id. at 110, 102 S.Ct. at 874 (quoting Lockett, 438 U.S. at 604, 98 S.Ct. at 2965) (emphasis in original). "Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper, 476 U.S. at 4, 106 S.Ct. at 1671 (quoting Eddings, 455 U.S. at 114, 102 S.Ct. at 877). The state does not contest this reading of the law. The issue upon which the parties disagree is whether the evidence is relevant.

Mak, 970 F.2d at 623 (emphasis in original; footnote omitted). The Court of Appeals did agree with the analysis of the dissent in state court, but that is because that dissent, unlike the majority, explicitly relied on this Court's cases regarding admission of defense evidence at the penalty phase. See State v. Mak, 105 Wash. 2d 692, 718 P.2d 407, 424 (majority), 448-450 (dissent), cert. denied, 479 U.S. 995 (1986).

The state's other assertion -- that the Court of Appeals

somehow followed the state dissent in misdescribing the defense's offer of proof in serious deviation from the state court majority's description -- is also incorrect. See the virtually identical descriptions of the defense's offer as set out in, respectively, the Washington Supreme Court majority and dissent. 718 P.2d at 423, 449.

The state does not deny that evidence of a connection between the third party, one Hing Wong, and the Wah Mee incident would be relevant to the death determination in this case; indeed, the state specifically conceded this in oral argument in the Court of Appeals, at which the state's counsel said "I think everybody conceded that had there been evidence that Hing Wong directed this crime that would certainly have been admissible during the guilt phase and during the penalty phase." The state could hardly claim otherwise, given the state's arguments at trial that Mr. Mak was the ringleader and chief planner.[8]

Here, the state's claim is really that "Although Mak showed a connection between Hing Wong and Benjamin Ng, he completely failed to establish any link between Hing Wong and the Wah Mee Massacre" (Petition at 20), and that there exists a reasonable

---

[8]/ The deprivation of Mr. Mak's ability to present this evidence is also notable because the prosecutors and the state courts have tried to justify the death sentence on the claimed basis that Mr. Mak was the planner of the Wah Mee killings. See State's Brief on Appeal, 26 REC 8991-8992 (claiming that the death sentence was justified for Mak when Ben Ng, the main triggerman, got life, because the state thinks Mak was the planner and leader). The Washington Supreme Court found that the death penalty for Mr. Mak was justified when a jury found Ng did not deserve death because, inter alia, there was evidence of Mak's planning. 718 P.2d at 428. Mak's testimony contested this, and the jury acquitted him of the aggravating factor of having a scheme or plan that included murder, yet he was precluded from adducing evidence even in the penalty phase regarding Hing Wong's plans and motives as connected to Wah Mee.

state court evidentiary ruling adequately accounting for constitutional rights along with state court findings of historical fact to support this to which the Court of Appeals did not show sufficient deference (Petition at 19, 23). Each premise of this alleged basis for review in this Court is flatly wrong.

First, trial counsel repeatedly demonstrated evidence of a clear connection between Hing Wong and the Wah Mee through the statement made to police by an informant:

> But for the connection, though, there is that indication from confidential informant number 30, indicating that Hing Wong ... , the informant indicated to Lieutenant Holter was the one that put Mak and Ng up to this...

10 REC 3781. The police deemed this information "from this informant that there was an individual directing the actions of the people inside the Wah Mee club, directing them to kill the people in the Wah Mee...sufficiently important to do follow-up on the information that was given ... by C.I. 30" (quotation from question from counsel at pretrial hearing, answered "Yes" by police lieutenant, 2 REC 485-486).

This evidence, though it was hearsay (not speculation as claimed by the state), would clearly have been admissible under the Washington rule -- conceded but not revealed to its true extent by the state in the Petition at 22 -- that the rules of evidence do not apply to mitigation evidence:

> The court [at a capital sentencing proceeding] shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence...

Wash. Rev. Code § 10.95.060(3) (pertinent part). The Washington Supreme Court in State v. Bartholomew, 98 Wash. 2d 173, 654 P.2d 1170 (1982)(Bartholomew I), vacated and remanded for

reconsideration, 463 U.S. 1203 (1983), reaffirmed, 101 Wash. 2d 631, 683 P.2d 1079 (1984)(Bartholomew II) has emphasized that this means there are significantly relaxed standards of both reliability and relevance:

> Defendant's right to present mitigating evidence is limited only by the requirement of relevance. The Rules of Evidence designed to ensure the reliability of evidence received by the court do not apply to mitigating information in a capital sentencing proceeding.

Bartholomew I, 654 P.2d at 1184 (emphasis added); first sentence quoted in Bartholomew II, 683 P.2d at 1087.

> Therefore, only evidence which is not probative or not relevant is excluded at the sentencing phase. With regard to mitigating circumstances, less restrictive standards for relevance and probative value are applied to exclude evidence at the sentencing phase than at the guilt phase.

Bartholomew II, 683 P.2d at 1088 (emphasis added).

The state fails as well to acknowledge other items of evidence admissible at penalty that would support the connections defense counsel sought to show. For example, the state claims that Hing Wong's plan to control gambling in the International District included "no talk about forcible robbery..." (Petition at 20-21). This overlooks the statement given to police by Andy Wong, who stated that robbery and terror were indeed contemplated. 8 REC 3055. The prosecution conceded that such "impeachment" existed (10 REC 3780), but, importantly, at the penalty phase this would have been directly admissible hearsay. Moreover, the state even misleads regarding Steve Chin's testimony: the state suggests Chin said that Hing Wong talked only about "showing muscle" (Petition at 20), but Chin's testimony actually describes a more dangerous approach:

> . . . they wanted to go in and show muscle, you know,

show the guns and show them that they do mean business. 10 REC 3770 (emphasis added). The state also conveniently overlooks testimony from Chin that Benjamin Ng, who shot most of the people at the Wah Mee, was indebted to and devoted to Hing Wong. 10 REC 3771-3773. Further, despite the state's suggestion that Ben Ng and Hing Wong could not be proven to have been "in contact . . . on the day of the Wah Mee murders" (Petition at 21), the prosecutor at trial admitted "There was contact [on that day], that was the extent of it, there are witnesses who would say that." 10 REC 3783.

Thus, the state is wrong to suggest that Mr. Mak had no "actual evidence" (Petition at 24; emphasis in original). Rather, the state just refuses to acknowledge the evidence Mr. Mak did have.

Second, the state's premise that Mr. Mak somehow had to conclusively "establish" a link between Wong and the Wah Mee before the evidence could become relevant and go to the jury betrays a much too restrictive understanding of "relevance":

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." New Jersey v. T.L.O., 469 U.S. 325, 345 (1985), quoting Fed. Rule Evid. 401. The meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding. As the Chief Justice of the North Carolina Supreme Court stated in dissent in this case:
>
> > "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It

> is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered." 323 N.C. at 55-56, 372 S.E. 2d, at 45 (Exum, C.J., dissenting), citing M. Graham, Handbook of Federal Evidence §401.1, n.12 (2d ed. 1986).

McKoy v. North Carolina, 494 U.S. 433, 440 (1990). In Washington, of course, "the fact-finder", indeed the final sentencer, is the jury. Wash. Rev. Code §10.95.080.

Significantly, in a Washington penalty phase, Mr. Mak did not have to prove mitigating circumstances by a preponderance, or indeed affirmatively prove anything. The state had to prove beyond a reasonable doubt the absence of sufficient mitigating circumstances. Wash. Rev. Code § 10.95.060(4). Thus, any evidence that would tend to raise a reasonable doubt as to culpability would be relevant.

Third, the state is incorrect in suggesting that the Washington Supreme Court majority adequately dealt with Mr. Mak's constitutional rights at a capital sentencing procedure. The state court majority incorrectly melded the distinct issues regarding exclusion of evidence at the guilt and penalty phases under merely an "abuse of discretion" standard:

> ISSUE ELEVEN. Did the trial court err in excluding, at both the guilt and penalty phases of the trial, evidence concerning a claimed accomplice of the defendant?
>
> CONCLUSION. The trial court did not abuse its discretion in excluding the testimony.

718 P. 2d at 423 (emphasis added). The majority analyzed in some detail the guilt phase question whether one can show at a normal criminal trial that another person was actually the perpetrator. 718 P.2d at 423-424. However, the majority then "resolved" the penalty phase claim in three short paragraphs without citation to

any United States Supreme Court case, saying only that "the defendant's proffered evidence in this regard was neither relevant nor probative". 718 P.2d at 424.[9]

Finally, the state's claim that the state court majority rejected Mr. Mak's penalty phase evidence claim on purely factual grounds is not right, either. The state concedes that "the ultimate determination of relevance would be characterized as a mixed question of fact and law..." (Petition at 19) (and therefore is subject to plenary review in federal court, Cuyler v. Sullivan, 446 U.S. 335, 341-342 (1980)). In spite of this abstract recognition that relevance is a legal issue, the state neglects to acknowledge that the Washington Supreme Court majority's penalty phase ruling was nothing but a conclusion on relevance. See entire penalty phase analysis quoted here at

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[9]/ Here is the entire analysis of the majority with respect to the penalty phase:

> During the special sentencing proceeding, the defendant again offered this same evidence, and again, the trial court excluded the evidence on relevancy grounds.
>
> Defendant argues that in light of our holding in State v. Bartholomew, 101 Wash.2d 631, 645, 683 P.2d 1079 (2984) (Bartholomew II), the evidence should at least have been admitted in that phase of the trial. However, as Bartholomew II pointed out:
>
> > The Washington capital punishment statute requires admission at the sentencing phase of "any relevant evidence which it deems to have probative value regardless of its inadmissibility under the rules of evidence ..." RCW 10.95.060(3). We have restricted this provision to evidence in mitigation of punishment. *Therefore, only evidence which is not probative or not relevant is excluded at the sentencing phase.*
>
> (Italics ours.)
>
> The defendant's proffered evidence in this regard was neither relevant nor probative.

718 P.2d at 424 (footnote omitted).

n. 9.[10]

The Court of Appeals' case-specific conclusion on this record was simply that under settled constitutional law Mr. Mak had a right to present "at the penalty phase circumstantial evidence from which it might be inferred that Mak's co-defendant, Ben Ng, and a third party, Hing Wong, rather than Mak, may have planned the massacre." Mak, 970 F.2d at 622 (footnote omitted). This unremarkable holding does not merit this Court's review.

II. THE COURT OF APPEALS' INEFFECTIVE ASSISTANCE DISCUSSION WAS MADE IN EXPLICIT CONFORMITY WITH STRICKLAND V. WASHINGTON AND THE CIRCUIT DID NOT PRESUME INEFFECTIVENESS OR OTHERWISE CONDUCT IMPROPER REVIEW.

A. The Court of Appeals, Far From "Presuming" Deficient Performance, Found That Based On The Detailed Record In This Case, Counsel's Performance At The Penalty Phase Fell Below An Objective Standard Of Reasonableness.

The circuit and district courts found that trial counsel in this capital case who 1) failed to conduct an investigation into their client's personal history and, 2) who failed even to communicate to their client's Chinese speaking parents, that they were their son's lawyers and not police (Evidentiary Hearing Ex. 2) and, 3) as a result of failing to look, failed to uncover a

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[10]/ The state tries to tease "factual findings" from the quotation on page 19 of the Petition and then claim that these are the "findings" that should have been given deference under 28 U.S.C. §2254(d). However, this quotation is from the state court majority's discussion of admissibility at the guilt phase made without consideration of penalty phase constitutional jurisprudence. Moreover, the majority's guilt phase discussion quoted contains a legal conclusion that there was a connection between Hing Wong "and the crimes at the Wah Mee" shown by one item of the proposed evidence (a connection the state itself disagrees with the state court majority about, Petition at 21 n.12). The majority found that item inadmissible at the guilt phase only because it was hearsay, but this does not bolster the penalty phase ruling because of course hearsay is admissible in the penalty phase. With respect to the penalty phase, the majority discussed none of the proposed evidence, even this item that concededly showed a connection between Wong and Wah Mee.

volume of favorable mitigation evidence,[11] and who 4) entered the penalty phase having obtained no favorable or sympathetic evidence about their client, even though such evidence was readily available,[12] fell below minimum standards of performance in a capital penalty hearing.[13] The circuit court summarized the penalty hearing: "Mak was depicted by the prosecution as a killing machine, and the defense presented no humanizing evidence whatsoever to offset that picture." Mak, 970 F.2d at 619.

The circuit and district courts did not depart in any way from the standard set forth in Strickland:

> ...counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 691 (1984).

Trial counsel testified at the evidentiary hearing, and the

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[11]/ The mitigating testimony of Mr. Mak's mother, father, brother, sister-in-law, nephew, and an expert on Chinese culture and Chinese immigrants, are partially set forth or summarized in the district court opinion. 754 F. Supp. at 1496-1499.

[12]/ The state tries here, as it has tried before, to imply that there was some risk to presenting evidence that Respondent had good and decent aspects to his life, Petition at 17. As shown above at p. 6, n. 5, this claim is unfounded.

[13]/ The only item of evidence obtained by trial counsel in preparation for the penalty phase of Mr. Mak's trial was the verdict form from co-defendant Ben Ng's trial which showed Ng was sentenced to life imprisonment without parole or release.

The expert testimony regarding eye-witness identification was intended by trial counsel for the guilt phase but was excluded by the trial court. Obviously, this testimony had nothing to do with the personal characteristics of the defendant.

The testimony regarding the leadership of an uncharged person, Hing Wong, in the crimes was also originally intended by trial counsel for the guilt phase, as shown by defense counsel's opening argument, but was excluded by from both phases by the trial court. See Statement Of The Case at pp. 4-6 above.

district court found, after personally interrogating trial counsel, that there was no tactical reason for counsel's failure to obtain and present the available favorable mitigating evidence. An expert witness testified in the district court that trial counsel's preparation and conduct of the penalty phase did not meet reasonable standards of defense. E.g., Ex. 17, pages 29-34.[14] The state presented no countervailing testimony that counsels' performance was reasonable in this case, and so the record before the lower courts was devoid of any testimony that trial counsel did meet "prevailing professional norms" for defense at a capital sentencing proceeding.

This is clearly a fact-based decision that on this record counsel's mitigation investigation and presentation was deficient. Instead of presuming deficient performance for failure to present mitigating evidence, the Court of Appeals was express in noting other circumstances, including other Court of Appeals cases and Strickland v. Washington, in which trial counsel's failure to present mitigating evidence was reasonable:

> In prior Supreme Court and Ninth Circuit cases dealing with failure to admit mitigating evidence where performance has been found reasonable, the attorneys had consciously decided not to present mitigating evidence because of reasonable tactical evaluations - specifically, they determined the evidence would have opened the door to damaging rebuttal evidence.

Mak, 970 F.2d at 618-619 (emphasis added; footnote citing cases omitted).

This Court has ruled:

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[14]/ This expert witness, Richard Cease, has been the director of the Spokane, Washington, Public Defenders Office for over twenty years, has tried several capital cases, and has been charged with the supervision and training of public defender staff attorneys for his entire public defender career.

> ...a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of a particular case, viewed as of the time of counsel's conduct.

Strickland, 466 U.S. at 690. In the instant case, the lower courts did precisely that and nothing else.

B. The Courts Below Discussed The Prejudice Standard In The Context Of The Governing State Law.

This Court directed in Strickland:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume... that the judge or jury acted according to law... The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision...
>
> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice for counsel's errors...

466 U.S. at 694-695. It could not be more clear that in determining prejudice, that is in determining whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different", (Strickland, 466 U.S. at 694) the courts must determine whether the results were likely to have been different under the governing state law.

Under Washington law, which governed the penalty phase of Mr. Mak's trial, the results would have been different, a death sentence would not have been imposed, if the state failed to convince the jury unanimously beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency.[15] The governing law recognizes two possible verdicts,

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[15]/ The reviewing court would be required to consider the probable effect of the "potentially powerful" mitigating evidence here given the statutory presumption that sufficient mitigating (continued...)

"yes" the jury is unanimously convinced that there are not sufficient mitigating circumstances to merit leniency, and "no" the jury is not unanimously convinced that there are not sufficient mitigating circumstances to merit leniency.[16] Under this scheme, there is no such thing as a hung jury, no such thing as a hold out juror. In the context of this law, the courts are required in determining prejudice under Strickland to consider the reasonable probability that had counsel performed adequately one or more jurors would have in following the law failed to be convinced of the absence of sufficient mitigating circumstances to merit leniency.

That is exactly what the lower courts did here. The Court of Appeals approved the district court's holding that had trial counsel, rather than depriving their client of the right to present mitigating evidence, instead had properly gathered and presented mitigation evidence, this

> very well might have [changed the outcome] - especially since the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be. There is thus a reasonable probability that, but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different.

754 F. Supp. at 1501 (emphasis added). The lower courts thus merely used Washington law's implicit provision that reasonable

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[15](...continued)
circumstances exist to merit leniency (State v. Jeffries, supra), and that the presumption of leniency alone may raise a reasonable doubt as to whether the state has proven an absence of mitigation sufficient to merit leniency. Campbell v. Kincheloe, 829 F.2d 1453 at 1466.

[16]/ The instant case was confused when the Court allowed a third verdict option for penalty jury, a unanimous "no". There is no authority under the Washington statute for the Court to inquire whether the jury is unanimous against the death penalty.

doubt in one or more lawfully acting jurors prohibits a death sentence to inform the reasonable probability analysis.

The state's claim that the "'effect on one juror' approach is a significant reduction of a defendant's affirmative burden under Strickland to prove actual prejudice," Petition at p. 12, is simply not true. As seen above, Strickland requires that prejudice must be assessed with a presumption of lawful juror behavior under the specific state law governing the proceedings in a determination of whether counsels' deficient performance prejudiced the client. The Court of Appeals followed the Strickland procedure.

Nor could the lower courts' analysis have a broader application than was intended by Strickland. When Strickland refers to a reasonable probability that without counsel's error the result would be different, it means a different verdict, not a lack of a verdict and mistrial. The probability that a non-unanimous jury would have resulted (what the state calls the "effect on one juror" approach) is a proper determination for a reviewing court only under a statute in which non-unanimity results in a final verdict, such as the Washington death penalty statute. There is nothing new or novel in the lower courts' application of the Strickland prejudice analysis under the state law which governed the proceedings.

C. The Court of Appeals Properly Approved Consideration Of The Circumstances of Co-Defendant Benjamin Ng's Case On The Question Of Prejudice.

The state makes the bold claim that the Court of Appeals "improperly inserted a sentence proportionality review into the Strickland analysis...", Petition at p. 13. This is false. As the state admits in a footnote, the lower courts expressly

rejected Respondent's claim that his death sentence was disproportionate to his co-defendant's life sentence:

> "The constitution does not require a general proportionality review in death penalty cases. See Pulley v. Harris, 465 U.S. 37, 43-44 (1984). None of the cases cited by Mak support the proposition that the eighth amendment requires that co-defendants convicted of the same crime receive the same sentence. The disparity in sentences in this instance may be explained by the fact that the Ng [co-defendant's] jury was presented with evidence of mitigating circumstances, while the Mak jury was not, a matter dealt with in the published portion of this disposition." Unpublished memorandum decision, Appendix to the Petition at p. B-21.

However, Pulley v. Harris has nothing to do with how a court may determine the existence of prejudice in a case of ineffective counsel under the Sixth Amendment.

In determining whether counsel's deficient performance has prejudiced a defendant, this Court requires:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Strickland, 466 U.S. at 694. In meeting this burden, nothing in Strickland prohibited Respondent from directing the court's attention to the fact that his co-defendant who was convicted of the identical crimes, found to have planned the crime, and is admitted by the state to be the main triggerman, produced mitigating evidence and received a life sentence. Nothing in Strickland requires a court to function in a vacuum.

Both of the lower courts considered the success of mitigation evidence in the co-defendant's case as only part of the prejudice analysis. More important in both courts was the fact that the mitigation evidence undiscovered by trial counsel would have moderated the penalty phase argument of the prosecutor:

> What separates Willie Mak from the others, is the same thing that distinguishes him from all other murderers, the premeditation of this crime, the total absence of fundamental values. There's nothing here to lessen moral culpability.

The district court found the omission of evidence of Respondent's positive traits, cultural influences, and wholesome family relationships prejudicial because that is precisely the evidence which was reasonably likely to have raised a reasonable doubt against the state's argument that Respondent was totally lacking in "fundamental values." A reasonable doubt is all that was necessary to change the outcome of Respondent's sentencing trial.

The Court of Appeals did not definitively rule on prejudice (because habeas relief was found necessary on the "exclusion of evidence" ground), thus presenting no issue for review here, but in any event there was no discernible problem with the Court of Appeals statement that "On the whole, we cannot find fault with the district court's prejudice analysis." 970 F.2d at 621.

III. THE COURT OF APPEALS CORRECTLY IDENTIFIED THE IMPORTANT CONSTITUTIONAL PROBLEMS WITH THE "UNANIMITY" INSTRUCTIONS FROM RESPONDENT'S PENALTY PHASE, BUT DID NOT REST ITS JUDGMENT ON THE PLAIN DEFECTS IN THOSE INSTRUCTIONS.

The state has grossly mischaracterized the Court of Appeals' opinion regarding instructional error. The court below correctly identified Mr. Mak's claim,

> Mak argues that the court's jury instructions and verdict form erroneously encouraged the jury to reach a unanimous verdict on all issues. Because the death penalty was the only issue that required a unanimous verdict, Mak alleges that this encouragement of unanimity necessarily encouraged jurors to vote for the death penalty and was contrary to law.

970 F.2d at 622.

Under the Washington statute which recognizes only two

verdicts -- "yes" the jury is unanimously convinced the state has proven an absence of sufficient mitigating circumstances to merit leniency and "no" the jury is not unanimously convinced -- the circuit found the trial court misstated the law to the defendant's detriment in instructing the jury "...All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed fill in the answer to the question in the verdict form to express your decision..." (Instruction 6), and in further instructing the jury to "deliberate with a view toward reaching a unanimous verdict..." (Instruction 2).[17] The Court of Appeals found the instructions not to be ambiguous but to affirmatively misstate the statutory law and concluded, "Challenged instructions number 2, 3 and the verdict form combined to improperly emphasize to the jury that unanimous agreement was required not to impose the death penalty...There is no question that challenged instruction number 6 was an erroneous statement of the law." 970 F.2d at 625.[18]

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[17]/ Contrary to the suggestion in the Petition at 28, the Washington Supreme Court did not expressly apply the death penalty statute to instructions 2 and 6. The state court did not mention Wash. Rev. Code §10.95.080(2) providing that the sentence shall be life imprisonment if the jury fails to return an affirmative answer to the statutory question, and it mentioned Wash. Rev. Code §10.95.080(4) only to reference the statutory sentencing question. Thus the circuit court could only look to the clear language of the Washington statute to derive that statute's meaning.

[18]/ The state completely omits from its petition discussion of penalty phase instruction no. 2 which directed the jury to "deliberate with a view to reaching a unanimous verdict..." The state must be aware, as was the Court of Appeals, that under Washington law that instruction is tantamount to directing the jury to "deliberate with a view to reaching a death verdict..." because only an affirmative answer to the statutory question, which results in a death sentence, requires unanimity. The state should also be fully aware that no other instruction nor the instructions read as a whole contained any language which

(continued...)

The Court of Appeals did no more than acknowledge here the problem recently discussed by Justice Scalia with reference to Mills v. Maryland, 486 U.S. 367 (1988):

> Whether or not Maryland law could constitutionally require unanimity, the Court of Appeals authoritatively determined that it did not do so; and a death sentence based upon an erroneous instruction to that effect would have to be set aside. Justice BLACKMUN is correct that "ambiguous jury instructions, even in a capital case, do not violate the Eighth Amendment simply because they are ambiguous," [citation omitted], but they do violate the Due Process Clause if they misstate the law to the defendant's detriment - and it is not essential to that violation that the law as misstated be an unconstitutional law.

McKoy v. North Carolina, 494 U.S. at 459, n. 1, Scalia, J. dissenting (first emphasis in original; second added).

The Court of Appeals did not abandon the criteria of Boyde v. California, 494 U.S. 370 (1990) for reviewing jury instructions. In quoting the prejudice analysis of Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1987), cert. denied, 479 U.S. 995 (1989) the Court of Appeals made reference to the reasonable probability test for determining prejudice on a claim of ineffective counsel. Of course, as made clear in Boyde itself, the "reasonable probability" prejudice standard for ineffective assistance claims is the same as the Boyde "reasonable likelihood" (that an instruction would be applied in an unconstitutional way) standard for judging jury instructions. Boyde, 494 U.S. at 380, n. 4, citing Strickland. Thus the state

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[18](...continued)
would inform the jury that a unanimous verdict was not strongly preferred by the Court. To the contrary, instruction no. 6, increased the pressure to reach a unanimous verdict by commanding the jury, "...All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed, fill in the answer to the question in the verdict form to express your decision." Emphasis added.

complains (Petition at 28, n. 20) about the application of what is in effect the Boyde standard.[19]

The Court of Appeals did not determine whether the prejudice created by penalty phase "unanimity" jury instructions was sufficient alone to require reversal of Respondent's death sentence because the erroneous exclusion of relevant mitigating evidence offered by the defendant itself required reversal of Respondent's death sentence. See 970 F.2d at 624, 625. In this sense, the Court's determination of the instruction claim was superfluous to its disposition of the case but was included so as to helpfully identify a constitutional error for the parties and trial court to avoid at any new sentencing proceeding.[20]

Unlike the state, which discusses only part of one instruction, No. 6, the Court of Appeals' carefully set forth pertinent language from and considered three jury instructions, which were all the instructions dealing in any way with the

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[19]/ Discussing a challenged instruction this Court stated in Boyde:

> The instruction is not concededly erroneous, nor found so by a court...The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

494 U.S. at 380 (citation omitted). The Boyde standard is to be used to interpret ambiguous instructions. The Court of Appeals in this case did apply but actually had no need to apply the Boyde standard because instead of considering whether the instructions were ambiguous and reasonably likely to be applied in an unconstitutional way, the court found that the challenged instructions unambiguously misstated the law.

[20]/ Instructions similar to those found erroneous in this case have not been routinely given in capital cases in Washington. Subsequent to Respondent's trial uniform jury instructions for capital sentencing hearings have been adopted and do not include similar instructions.

unanimity or non-unanimity of the jury (numbers 2, 3 and 6),[21] and also set forth and considered the verdict form. 970 F.2d at 624. Furthermore, unlike the state, the circuit court carefully considered the applicable death penalty law and the manner in which the prosecutor used the challenged instructions in argument to the jury.[22] Far from considering the instructions in isolation (Petition at 25), the court below could have done no more to put the instructions in context.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

DATED: January 27, 1993.

Respectfully submitted,

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[21]/ The Court gave only six penalty instructions in total. Instruction 1 was the general introductory instruction, No. 4 explained the burden of proof and reasonable doubt, No. 5 defined "mitigating circumstance".

[22]/ The Court had before it the penalty phase closing argument of the prosecutor which falsely suggested to the jury that it had a duty to be unanimous in the penalty phase equal to its duty to be unanimous in the guilt phase of the trial. The prosecutor said as his nearly last word before the jury retired to determine the sentencing question: "You have an instruction here that jurors should consult with one another and deliberate with a view of reaching a unanimous verdict if it can be done without violence to individual judgment. You've already deliberated through a case once, so you know what that's all about..." 11 REC 4172.

EDITOR'S NOTE

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APPENDIX

10.95.020. Aggravated first degree murder defined

A person is guilty of aggravated first degree murder if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the board of prison terms and paroles;[1] or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;

(8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(10) The victim was regularly employed or self-employed as a news reporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

10.95.030. Sentences for aggravated first degree murder

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the board of prison terms and paroles[1] or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

10.95.040. Special sentencing proceeding—Notice—Filing—Service

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

10.95.050. Special sentencing proceeding—When held—Jury to decide matters presented—Waiver—Reconvening same jury—Impanelling new jury—Peremptory challenges

(1) If a defendant is adjudicated guilty of aggravated first degree murder, whether by acceptance of a plea of guilty, by verdict of a jury, or by decision of the trial court sitting without a jury, a special sentencing proceeding shall be held if a notice of special sentencing proceeding was filed and served as provided by RCW 10.95.040. No sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held.

(2) A jury shall decide the matters presented in the special sentencing proceeding unless a jury is waived in the discretion of the court and with the consent of the defendant and the prosecuting attorney.

(3) If the defendant's guilt was determined by a jury verdict, the trial court shall reconvene the same jury to hear the special sentencing proceeding. The proceeding shall commence as soon as practicable after completion of the trial at which the defendant's guilt was determined. If, however, unforeseen circumstances make it impracticable to reconvene the same jury to hear the special sentencing proceeding, the trial court may dismiss that jury and convene a jury pursuant to subsection (4) of this section.

(4) If the defendant's guilt was determined by plea of guilty or by decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including but not limited to a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial court shall impanel a jury of twelve persons plus whatever alternate jurors the trial court deems necessary. The defense and prosecution shall each be allowed to peremptorily challenge twelve jurors. If there is more than one defendant, each defendant shall be allowed an additional peremptory challenge and the prosecution shall be allowed a like number of additional challenges. If alternate jurors are selected, the defense and prosecution shall each be allowed one peremptory challenge for each alternate juror to be selected and if there is more than one defendant each defendant shall be allowed an additional peremptory challenge for each alternate juror to be selected and the prosecution shall be allowed a like number of additional challenges.

10.95.060. Special sentencing proceeding—Jury instructions—Opening statements—Evidence—Arguments—Question for jury

(1) At the commencement of the special sentencing proceeding, the trial court shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its decision, as provided in RCW 10.95.030.

(2) At the special sentencing proceeding both the prosecution and defense shall be allowed to make an opening statement. The prosecution shall first present evidence and then the defense may present evidence. Rebuttal evidence may be presented by each side. Upon conclusion of the evidence, the court shall instruct the jury and then the prosecution and defense shall be permitted to present argument. The prosecution shall open and conclude the argument.

(3) The court shall admit any relevant evidence which it deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity. The defendant shall be accorded a fair opportunity to rebut or offer any hearsay evidence.

In addition to evidence of whether or not there are sufficient mitigating circumstances to merit leniency, if the jury sitting in the special sentencing proceeding has not heard evidence of the aggravated first degree murder of which the defendant stands convicted, both the defense and prosecution may introduce evidence concerning the facts and circumstances of the murder.

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

In order to return an affirmative answer to the question posed by this subsection, the jury must so find unanimously.

10.95.070. Special sentencing proceeding—Factors which jury may consider in deciding whether leniency merited

In deciding the question posed by RCW 10.95.060(4), the jury, or the court if a jury is waived, may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

10.95.080. When sentence to death or sentence to life imprisonment shall be imposed

(1) If a jury answers affirmatively the question posed by RCW 10.95.060(4), or when a jury is waived as allowed by RCW 10.95.050(2) and the trial court answers affirmatively the question posed by RCW 10.95.060(4), the defendant shall be sentenced to death. The trial court may not suspend or defer the execution or imposition of the sentence.

(2) If the jury does not return an affirmative answer to the question posed in RCW 10.95.060(4), the defendant shall be sentenced to life imprisonment as provided in RCW 10.95.030(1).

10.95.090. Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid

If any sentence of death imposed pursuant to this chapter is commuted by the governor, or held to be invalid by a final judgment of a court after all avenues of appeal have been exhausted by the parties to the action, or if the death penalty established by this chapter is held to be invalid by a final judgment of a court which is binding on all courts in the state, the sentence for aggravated first degree murder if there was an affirmative response to the question posed by RCW 10.95.060(4) shall be life imprisonment as provided in RCW 10.95.030(1).